

IN THE MISSOURI COURT OF APPEALS  
SOUTHERN DISTRICT

---

NAYLOR SENIOR CITIZENS	)	
HOUSING, LP, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	Appeal No. SD32098
	)	
SIDES CONSTRUCTION	)	
COMPANY, INC., et al.,	)	
	)	
Respondents.	)	

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APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY,  
STATE OF MISSOURI

THE HONORABLE MICHAEL LIGONS  
CIRCUIT JUDGE, PRESIDING

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BRIEF OF RESPONDENT DILLE & TRAXEL, LLC

---

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**Abbreviation:**

“AB”            Appellants’ Brief

“LF”            Legal File

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### **JURISDICTIONAL STATEMENT**

This appeal arises from the Circuit Court of Ripley County's Partial Judgment granting Defendants' Motions to Dismiss on the ground that the Petition filed and signed by a non-lawyer on behalf of Naylor Senior Citizens Housing, L.P., and Naylor Senior Citizens housing, II, L.P., (collectively "Naylor Partnerships") is a nullity and had no legal effect. (LF 70, 98) The trial court designated its judgment under Rule 74.01(b) as a final judgment for purposes of appeal. (LF 98)

This case falls within the appellate jurisdiction of the Missouri Court of Appeals because the Naylor Partnerships' appeal raises no issues subject to the exclusive appellate jurisdiction of the Supreme Court of Missouri as set forth in Article V, Section 3 of the Missouri Constitution. Under Missouri Revised Statutes Section 477.050, territorial jurisdiction rests with the Southern District of the Missouri Court of Appeals because this appeal arises from an action within the jurisdiction of the Circuit Court of Ripley County.

## STATEMENT OF FACTS

This appeal arises from the trial court's Partial Judgment dismissing Plaintiffs Naylor Senior Citizens Housing, LP, and Naylor Senior Citizens Housing II, LP's (collectively "Naylor Partnerships") Petition. (LF 70, 98) The Naylor Partnerships are limited partnerships registered in Missouri with John Dilks acting as their managing partner. (LF 7-11)

On September 21, 2011, Dilks filed a Petition naming Defendants Sides Construction Company, Inc., City of Naylor, Schultz Engineering Services, Inc., Naylor RII Public Schools, and Dille and Traxel, LLC, (collectively "Defendants") as defendants. (LF 7-11) In the Petition, Dilks alleged that Defendants negligently caused flood damage to Plaintiffs' real property. (*Id.*) Dilks signed the Petition, *pro se*, on behalf of himself and the Naylor Partnerships. (LF 11)

Defendants Schultz Engineering Services, Inc. (LF 12), City of Naylor (LF 24), and Sides Construction Company (LF 30) filed separate motions to dismiss the Partnerships' claims for violation of Rule 55.03(a) of the Missouri Rules of Civil Procedure. Defendants argued the Petition was a nullity because Dilks, acting *pro se*, improperly signed the Petition on behalf of the Naylor Partnerships. (LF 12-13, 24-25, 30-31)

On December 21, 2011, Plaintiffs retained counsel and filed a Reply to Defendants' Motions to Dismiss. (LF 33-41) The Naylor Partnerships argued that under Rule 55.03(a), the trial court should give the Naylor Partnerships a reasonable time to



correct the omission and have an attorney sign the Petition on their behalf. (LF 33-35) In support, the Naylor Partnerships submitted John Dilks' Affidavit. (LF 38-39) In the Affidavit, Dilks stated that he consulted with an attorney regarding the lawsuit, but that the attorney withdrew as counsel after learning of a conflict of interest with one of the Defendants. (LF 39) Before withdrawing, the attorney prepared the Petition and advised Dilks to file the Petition personally because the statute of limitations had almost expired. (*Id.*) Dilks further stated that he was not advised that a licensed attorney must file pleadings made on behalf of a limited partnership. (*Id.*)

Defendants Sides Construction Company, Inc., Schultz Engineering Services, Inc., Dille & Traxel, LLC, and Naylor R-II Schools filed responses to the Naylor Partnerships' Reply. (LF 42-55) In their responses, Defendants argued that, while Missouri courts have allowed individuals to correct pleadings not signed by a licensed attorney under limited circumstances, Missouri law requires that limited partnerships act only through counsel and that pleadings signed by a non-lawyer on a limited partnerships' behalf must be dismissed. (*Id.*)

Following a hearing, the trial court agreed with Defendants, finding the Petition a nullity as to the Naylor Partnerships without legal effect and dismissing the Naylor Partnerships' claims. (LF 5, 70) On the Naylor Partnerships' motion, the trial court entered a Partial Judgment, designating its order as a final judgment for purposes of appeal. (LF 77-79, 98) This appeal followed.

# **POINT RELIED ON**

- I. The trial court did not err in granting Defendants' Motions to Dismiss because the Naylor Partnerships' Petition constitutes a legal nullity in that:
  - A. Dilks' unauthorized practice of law in filing and signing the Petition on Naylor Partnerships' behalf renders the Petition a nullity;
  - B. Missouri case law has not abandoned the nullity rule where, as here, a non-lawyer improperly files a pleading on behalf of a legal entity; and
  - C. Dilks is not a lawyer and his signing and filing of the Petition amounted to the unauthorized practice of law even though he is the Naylor Partnerships' general partner, did not prepare the Petition, and filed the Petition based on the advice of an attorney.

*Hensel v. American Air Network*, 189 S.W.3d 582 (Mo. banc 2006)

*Reed v. Labor & Indus. Relations Comm'n*, 789 S.W.2d 19 (Mo. banc 1990)

*Schenberg v. Bitzmart, Inc.*, 178 S.W.3d 543 (Mo. App. E.D. 2005)

*Weems v. Montgomery*, 126 S.W.3d 479 (Mo. App. W.D. 2004)

## ARGUMENT

- I. The trial court did not err in granting Defendants' Motions to Dismiss because the Naylor Partnerships' Petition constitutes a legal nullity in that:
  - A. Dilks' unauthorized practice of law in filing and signing the Petition on Naylor Partnerships' behalf renders the Petition a nullity;
  - B. Missouri case law has not abandoned the nullity rule where, as here, a non-lawyer improperly files a pleading on behalf of a legal entity; and
  - C. Dilks is not a lawyer and his signing and filing of the Petition amounted to the unauthorized practice of law even though he is the Naylor Partnerships' general partner, did not prepare the Petition, and filed the Petition based on the advice of an attorney.

### 1. Introduction

Because the Naylor Partnerships' Points Relied On contain intertwined issues, arguments, and authorities, Respondent Dille & Traxel, LLC, responds to both points together. Missouri courts have repeatedly and consistently held that legal entities, such as the Naylor Partnerships, must act only through an attorney in all legal proceedings and that any pleadings filed by the entities without an attorney constitute nullities of no legal effect.

Despite this, the Naylor Partnerships rely on an exception for *individuals* to correct a failure to file a pleading without a proper signature to assert the trial court erred in dismissing their claims. However, the Missouri Supreme Court has held that this

exception applies only to individuals and not legal entities, such as the Naylor Partnerships. Because Missouri law places restrictions on such legal entities, the Missouri Supreme Court determined that it remains paramount that these entities act only through an attorney in all legal proceedings, regardless of any exceptions applicable to individuals.

This holds true even if Dilks, a general partner and manager, acted with the advice of an attorney and under a belief that his actions were proper. Under Missouri law, a legal entity engages in the illegal unlicensed practice of law when it signs and files a pleading on its own behalf. Any such pleadings remain null and void. Missouri courts and the legislature have affirmed that this restriction on legal entities must apply in all legal proceedings. The trial court, therefore, committed no error in dismissing the Naylor Partnerships' improperly filed claims.

## **2. Standard of Review**

The Naylor Partnerships incorrectly argue this Court should review the trial court's grant of Defendants' Motions to Dismiss under the summary judgment, *de novo* standard of review. (AB 5) The Naylor Partnerships assert that the trial court treated Defendants' Motions to Dismiss as a motion for summary judgment when it "apparently considered" the Affidavit of John Dilks, a matter outside the scope of the pleadings. (*Id.*) Not so. The Naylor Partnerships did not transform Defendants' Motions to Dismiss, which were based entirely on the pleadings, into motions for summary judgment by filing an affidavit.

Under Rule 55.27 of the Missouri Rules of Civil Procedure, the trial court must treat a motion as one for summary judgment when matters outside of the pleadings are presented to, and not excluded by, the trial court. Rule 55.27 further provides that for a trial court to treat a motion to dismiss as one for summary judgment, the court must allow the parties a “reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.” *Id.* Accordingly, “[i]n order to consider the matters outside the pleadings and treat the motion as one for summary judgment, the court must give notice to the parties that it is going to do so.” *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 126-27 (Mo. App. E.D. 2009).

Here, the trial court did not provide Defendants notice that it was treating their Motions to Dismiss as motions for summary judgment based on the Naylor Partnerships’ submission of Dilks’ affidavit. Moreover, the trial court’s order and Partial Judgment do not indicate that the trial court considered Dilks’ affidavit in reaching its decision. (LF 70, 98) Accordingly, the correct standard of review is for a grant of a motion to dismiss. *Id.*

This Court reviews a grant of a motion to dismiss *de novo*. *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App. W.D. 2004). In reviewing the grant of a motion to dismiss, the appellate court may not address the merits of the case or consider evidence outside the pleadings. *Id.* (quoting *Brennan By and Through Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. App. W.D. 1997)). Additionally, the trial court’s dismissal will be affirmed if it is supported by any ground,

regardless of whether the trial court relied on that ground. *France v. Podleski*, 303 S.W.3d 615, 618 (Mo. App. S.D. 2010).

**3. Dilks' unauthorized practice of law in filing and signing the Petition on the Naylor Partnerships' behalf renders the Petition a nullity.**

The trial court did not err in dismissing the Petition as to the Naylor Partnerships because Dilks' filing and signing the Petition on behalf of the Partnerships constituted the unauthorized practice of law. Where, as here, a non-lawyer engages in the unauthorized practice of law by improperly filing and signing a pleading on a legal entity's behalf, the trial court must treat the pleading as a nullity and dismiss the action.

Legal entities such as corporations may act in legal proceedings only through a duly licensed attorney. *Reed v. Labor and Indus. Relations Comm'n*, 789 S.W.2d 19, 23 (Mo. banc 1990). Unlike natural persons, corporations cannot represent themselves in legal proceedings. *Id.* Corporations are legal entities created through statute and may act only through their representatives and agents. *Id.*

Limited partnerships, like corporations, are legal entities that may act only through their representatives. *See, e.g., DeBry v. Cascade Enters.*, 879 P.2d 1353, 1362 (Utah 1994); *Nat. Bank of Austin v. First Wis. Nat. Bank*, 368 N.E.2d 119, 125 (Ill. App. 1977). Missouri statutes also mandate that limited partnerships may sue and be sued, as well as complain and defend, an action in court in the limited partnership's name only. MO. REV. STAT § 359.081. The Naylor Partnerships have not disputed Defendants' position

that an attorney must represent limited partnerships in all legal proceedings. (*See, e.g.*, AB 10)

Missouri courts have further made clear the filing and signing of pleadings in court on another party's behalf constitutes the practice of law. *Risbeck v. Bond*, 885 S.W.2d 749, 750 (Mo. App. S.D. 1994); *see also* MO. REV. STAT. § 484.010. Consequently, a legal entity may only file a pleading in court through a duly licensed attorney. *Schenberg v. Bitzmart, Inc.*, 178 S.W.3d 543, 544 (Mo. App. E.D. 2005); *Joseph Sansone Co. v. Bay View Golf Course*, 97 S.W.3d 531, 532 (Mo. App. E.D. 2003). When a non-lawyer attempts to file a pleading on behalf of a legal entity, the non-lawyer's action constitutes the unauthorized practice of law. *Schenberg*, 178 S.W.3d at 544; *Joseph Sansone Co.*, 97 S.W.3d at 532.

Where a non-lawyer engages in the unauthorized practice of law, the proper remedy is to dismiss the cause or treat the actions taken by the non-lawyer as a nullity. *See 6226 Northwood Condominium Ass'n v. Dwyer*, 330 S.W.3d 504, 506 (Mo. App. E.D. 2010); *see also Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 241 (Mo. App. E.D. 2000); *Stamatiou v. El Greco Studios*, 935 S.W.2d 701, 702 (Mo. App. W.D. 1996). Applying this rule, numerous Missouri courts have held that when a non-lawyer improperly files and signs pleadings on behalf of the legal entity, the pleadings are a nullity. *Schenberg*, 178 S.W.3d at 544; *Sansone Co.*, 97 S.W.3d at 532; *Stamatiou*, 935 S.W.2d at 702; *Prop. Exchange & Sales, Inc., (PESI) by Jacobs v. Bozarth*, 778 S.W.2d 1, 3 (Mo. App. E.D. 1989).

Here, Dilks engaged in the unauthorized practice of law when he filed and signed the Petition on behalf of the Naylor Partnerships. Dilks is admittedly not a licensed attorney and no other attorney represented the Partnerships at the time Dilks filed the Petition. (LF 11) Accordingly, the trial court did not err when it found the Petition as to the Naylor Partnerships was a nullity, dismissing their claims. *See, e.g., Sansone Co.*, 97 S.W.3d at 532.

**4. Missouri case law has not abandoned the nullity rule where, as here, a non-lawyer improperly files a pleading on behalf of a legal entity.**

Despite the extensive line of Missouri court opinions holding that pleadings filed on behalf of a legal entity by a non-lawyer constitute a nullity, the Naylor Partnerships argue the nullity rule has been or should be abandoned and the Partnerships should be allowed to correct the Petition by having their current attorney sign it. (AB 5) In support of their argument, the Naylor Partnerships rely on case law interpreting Rule 55.03(a), which allows an attorney of record or a self-represented party who fails to sign a pleading the opportunity to correct the omission.

The Naylor Partnerships' argument proves meritless because the Naylor Partnerships rely on case law addressing only the nullity rule's application to unsigned pleadings filed by *individuals*. The courts did not address the present situation where a non-lawyer attempted to sign and file pleadings on behalf of a legal entity. In fact, in one case relied on by the Naylor Partnerships, the Missouri Supreme Court, while allowing a



narrow exception to the nullity rule to individuals, expressly re-affirmed the rule that where, as here, a non-lawyer improperly files a pleading on behalf of a legal entity, the pleading constitutes a nullity.

In *Hensel v. American Air Network*, a Missouri attorney filed a pleading on behalf of two individuals signed by a Kentucky attorney not licensed to practice law in Missouri. 189 S.W.3d 582, 582 (Mo. banc 2006). The trial court later admitted the Kentucky attorney *pro hac vice*, after the Petition was already filed. *Id.* The *Hensel* Court recognized that “[b]ecause [the Kentucky attorney] was not admitted to practice under Rule 9.03 at the time she purported to sign the petition, the signature was, in essence, a nullity—the petition was unsigned.” *Id.* at 583.

The Supreme Court then considered whether treating the petition as a nullity was the proper sanction when the individual promptly corrected the omitted signature as provided in Rule 55.03(a). *Id.* Rule 55.03(a) provides that “an unsigned filing or an electronic filing without the required certification shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party filing same.” MO. R. CIV. P. 55.03(a). The Court determined that “[u]nder the facts of this case” the petition was not a nullity because “[w]here in a particular case *involving an individual* the only issue of unauthorized practice is the signature on the petition required by Rule 55.03, the sanction of depriving the litigant of a cause of action is disproportionate to the harm.” *Hensel*, 189 S.W.3d at 584 (emphasis added).

While declining to apply the nullity rule to the individual in that case, the *Hensel* Court then expressly found “[t]he rule is different with respect to filings on behalf of a corporation.” *Id.* at 584 n3. The Court re-affirmed the principle that “[i]t is axiomatic that a corporation must act through an attorney in all legal matters.” (quoting *Reed v. Labor & Indus. Relations Comm’n*, 789 S.W.2d 19, 23 (Mo. banc 1990)). The *Hensel* Court cited with approval the *Reed* decision, in which the Court held that the rule for corporations is that filings by a non-lawyer on behalf of a corporation are “null and void.” *Reed*, 789 S.W.2d at 23.

Like *Hensel*, the other cases the Naylor Partnerships rely on are distinguishable in that they also involve pleadings filed by an individual without the required signature. *See Glover v. State*, 225 S.W.3d 425, 427-28 (Mo. banc 2007); *Carter v. State*, 181 S.W.3d 78, 79-80 (Mo. banc 2006)); *In re Estate of Conrad*, 272 S.W.3d 313, 315 (Mo. App. W.D. 2008). Moreover, the individual plaintiffs in these cases did not file a pleading signed by a person unauthorized to practice law, but rather the individual attempted to file the pleading, *pro se*, and merely neglected to sign it.

The Naylor Partnerships rely on *Glover v. State* and *Carter v. State*, both of which involved *pro se* individuals who failed to sign their own motions for post-conviction relief. (AB at 7) (citing *Glover*, 225 S.W.3d at 427-28; *Carter*, 181 S.W.3d at 79-80). The *pro se* individuals, unlike the Naylor Partnerships in this case, could properly represent themselves in their actions, and the Court held that the *pro se* individuals could

promptly correct the omission by filing a signed pleading under Rule 55.03(a). *Glover*, 225 S.W.3d at 427-28; *Carter*, 181 S.W.3d at 79-80.

Finally, the Naylor Partnerships also rely on *In re Estate of Conrad*, wherein three individual claimants filed probate claims against an estate, but failed to sign their claims, as required under Missouri Revised Statute § 473.380.1. (AB 8) (citing *Conrad*, 272 S.W.3d at 315). In *Conrad*, the parties did not dispute that the three individuals could properly bring the claims on their own behalf. 272 S.W.3d at 315. The Court applied Rule 55.03(a), and held that the trial court erred in dismissing the claims because the claimants promptly “supplied the missing signatures” correcting the “signature defect.” *Id.* at 319.

The Naylor Partnerships’ contention that Missouri courts have abandoned the nullity rule has no merit and the Partnerships fail to address the present circumstances in which a non-lawyer attempted to file and sign pleadings on a legal entity’s behalf. Moreover, the decision in *Hensel*, upon which the Naylor Partnerships rely, expressly reaffirms the nullity rule as it applies to pleadings filed on a legal entity’s behalf. Because Missouri courts strictly enforce the nullity rule for pleadings filed by non-attorneys on behalf of legal entities, the trial court did not err in dismissing the Naylor Partnerships’ claims.

5. **Dilks is not a lawyer and his signing and filing of the Petition amounted to the unauthorized practice of law even though he is the Naylor Partnerships' general partner, did not prepare the Petition, and filed the Petition based on the advice of an attorney.**

The Naylor Partnerships next contend the trial court erred in dismissing the Petition because Dilks, as the general partner of the Naylor Partnerships, did not engage in the unauthorized practice of law under the facts of this case. In support of their argument, the Naylor Partnerships note that Dilks did not prepare the Petition and he followed instructions of a law firm in signing and filing the Petition. (LF 9-10.) The Naylor Partnerships' argument should be denied. Dilks' did not have the authority to represent the Partnerships *pro se* by virtue of his position as the Partnerships' general manager.

As an initial matter, the Naylor Partnerships' argument improperly relies on facts contained in Dilks' affidavit that the Partnerships previously attached to their Reply to Defendants' Motions to Dismiss. Dilks' affidavit is outside the scope of the pleadings, and because the trial court did not provide the parties notice that it was treating the motion to dismiss as one for summary judgment, this Court reviews the trial court's dismissal of the Naylor Partnerships' Petition on the pleadings only, and may not consider Dilks' affidavit. *See Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App. W.D. 2004).

However, even if this Court considers Dilks' affidavit, it does not save the Naylor Partnerships' cause. When Dilks' signed and filed the Petition, he engaged in the unauthorized practice of law, even though he did not prepare the Petition and filed the Petition on counsel's advice. As discussed above, Missouri courts have consistently held the filing and signing of a pleading by a non-attorney on a legal entity's behalf constitutes the unauthorized practice of law. *Reed*, 789 S.W.2d at 23; *Schenberg*, 178 S.W.3d at 544; *Sansone Co.*, 97 S.W.3d at 532; *Bozarth*, 778 S.W.2d at 3. An officer of a legal entity may not represent the entity in a legal proceeding, unless the officer is an attorney. *Sansone Co.*, 97 S.W.3d at 532.

Additionally, Missouri courts hold that an action does not fall outside the practice of law merely because of "the simplicity of the acts performed." *Automobile Club of Mo. v. Hoffmeister*, 338 S.W.2d 348, 355 (Mo. App. 1960). An "honest belief" that certain actions did not constitute the practice of law is not "lawful excuse for engaging in the practice of law without a license authorizing them to do so." *Clark v. Austin*, 101 S.W.2d 977, 984-85 (Mo. banc 1937).

Given the clear Missouri case law, it is beyond dispute that Dilks, a non-lawyer, purporting to file and sign a petition and initiate a lawsuit on behalf of two limited partnerships, engaged in the unauthorized practice of law. That Dilks is a general partner of the Naylor Partnerships, did not prepare the Petition, and filed the Petition innocently based on the advice of counsel is irrelevant.

In another attempt to excuse Dilks' unauthorized practice of law, the Naylor Partnerships again rely on *Hensel v. American Air Network*. 189 S.W.3d 582 for the position that Dilks' signing of the Petition did not amount to the practice of law. (AB 9-10) *Hensel* does not support the Naylor Partnerships' argument. There, the Court specifically concluded a pleading signed by the Kentucky attorney not authorized to practice law in Missouri constituted the unauthorized practice of law. *Id.* at 584.

Finally, the Naylor Partnerships cite *Haggard v. Division of Employment Security*, which proves equally unavailing. (AB 10) (citing *Haggard*, 238 S.W.3d 151 (Mo. banc 2007)). In *Haggard*, the adverse party did not object to the improper representation. *Id.* at 155. The Court held the improper representation by a non-lawyer is not jurisdictional and that the resulting judgment from the improper representation was not null and void, "unless the error was raised and preserved." *Id.* Here, the record is clear, and the Naylor Partnerships do not dispute, that Defendants filed their Motions to Dismiss based on Dilks' improper representation of the Naylor Partnerships at the earliest opportunity.

The law cited by the Naylor Partnerships is inapplicable and their claim that Dilks did not engage in the practice of law is meritless. Missouri courts have consistently made clear that a non-lawyer may not sign and file a pleading on behalf of a legal entity. Accordingly, Dilks engaged in the unauthorized practice of law when he filed and signed the Naylor Partnerships' Claims, and, as discussed above, the proper remedy was for the trial court to treat the Petition as a nullity.

## CONCLUSION

Missouri law is clear that a non-lawyers' filing and signing of a pleading on behalf of a legal entity constitutes the unauthorized practice of law, for which the proper remedy is to treat the pleading as a nullity. Because the trial court properly determined that the Petition filed and signed by Dilks on behalf of the Naylor Partnerships was a nullity, we respectfully request that this Court affirm the trial court's judgment.

Respectfully submitted,

/s/ Teresa Young

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Brief includes information required by Rule 55.03;
2. The Respondent's Brief complies with the limitations contained in Rule 84.06;
3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, certificate of service, table of contents and table of authorities, contains 3,943 words, as determined by the word-count tool contained in the Microsoft Word 2000 software with which this Respondent's Brief was prepared; and
4. Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information and belief, is virus free.

/s/ Teresa Young



### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed through the Missouri Court's electronic filing system on December 10, 2012, to be served to:

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